

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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Federal Communications Commission  
Office of Secretary

In the Matter of )

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GN Docket No. 96-113

Section 257 Proceeding to )  
Identify and Eliminate )  
Market Entry Barriers for )  
Small Businesses )

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COMMENTS

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## **SUMMARY**

The National Association of Black Owned Broadcasters, Inc. ("NABOB"), by its attorneys, hereby submits its Comments in the above-captioned proceeding. NABOB submits that the Commission's decisions in this proceeding must further its statutorily mandated obligation to promote a diversity of viewpoints through assuring a diversity of ownership of the nation's communications industry, particularly including ownership by minority owned businesses. NABOB submits that the Commission must use this proceeding to begin development of the record for an "Adarand Study." Absent such a study the Commission will be severely hampered in developing policies designed to address the market entry barriers faced by African Americans and other minorities.

The barriers to entry for minority entrepreneurs are not new to the Commission. The Commission has been developing the record on barriers to entry for minority entrepreneurs in the telecommunications industry for over twenty years. The Commission must include that twenty year record in the record of this proceeding and in the required Adarand Study. For over twenty years, African Americans and other minorities have demonstrated to the Commission that the principal barrier to entry continues to be lack of access to capital. Absent an Adarand Study, the Commission

will be unable to promote policies designed to assist minorities to obtain access to capital, or to address the other barriers to entry faced by African Americans and other minorities.

In addition, the Commission should recommend to Congress that it reinstate the minority tax certificate policy. The tax certificate program was the single most effective way of increasing minority ownership used by the Commission. No serious discussion of eliminating market entry barriers for minorities can begin without consideration of this fact. The loss of the tax certificate program is itself a market entry barrier that the Commission should seek to address.

Further, the cumulative effect of the loss of the tax certificate program and the loss of most of the multiple ownership rules in the Telecommunications Act of 1996 threatens to make minority ownership a dinosaur in an evolving telecommunications revolution. The Telecommunications Act of 1996 is the culmination of a series of regulatory policy changes which have encouraged a massive consolidation of ownership in the telecommunications industry, and that consolidation is an almost insurmountable barrier to entry as well as a catalyst driving some existing minority owners out of the industry.

## TABLE OF CONTENTS

	<u>Page</u>
SUMMARY . . . . .	i
I. NABOB HAS A SUBSTANTIAL INTEREST IN THIS PROCEEDING . .	2
II. THE BARRIERS TO ENTRY HAVE NOT CHANGED FOR AFRICAN AMERICAN BROADCASTERS . . . . .	4
III. THE COMMISSION HAS BEEN DEVELOPING THE RECORD WHICH JUSTIFIES POLICIES TO PROMOTE MINORITY OWNERSHIP IN THE COMMUNICATIONS INDUSTRY FOR APPROXIMATELY TWENTY YEARS . . . . .	8
IV. THERE ARE CURRENT MARKET ENTRY BARRIERS FACING MINORITY ENTREPRENEURS THAT ARE THE DIRECT RESULT OF RACIAL DISCRIMINATION IN THE COMMUNICATIONS INDUSTRY . . . . .	11
V. THE COMMISSION HAS A STATUTORY OBLIGATION TO CONTINUE TO PROMOTE MINORITY OWNERSHIP . . . . .	16
VI. THE COMMISSION MUST CONDUCT AN <u>ADARAND</u> STUDY TO COMPLY WITH THE REQUIREMENTS OF <u>ADARAND</u> V. <u>PENA</u> SHOWING THE NEED FOR POLICIES TO PROMOTE MINORITY OWNERSHIP . . . . .	17
VII. THE COMMISSION MUST TAKE ACTION TO PRESERVE EXISTING MINORITY OWNERSHIP AND TO FOSTER ENTRY BY NEW MINORITY ENTREPRENEURS . . . . .	19
VIII. CONCLUSION . . . . .	20

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**COMMENTS**

**NATIONAL ASSOCIATION OF BLACK OWNED BROADCASTERS**

The National Association of Black Owned Broadcasters, Inc. ("NABOB"), by its attorneys, hereby submits its Comments in the above-captioned proceeding. NABOB submits that the Commission should consider in this proceeding that the issues raised here are not new to the Commission. Over the past twenty years the Commission has developed a substantial record on the barriers to entry for minority entrepreneurs seeking to enter the telecommunications industry. Therefore, the Commission should begin by including the record developed over that twenty year history in this proceeding. NABOB further submits that the Commission must do an extensive and thorough "Adarand Study" to adequately address the issues raised in this proceeding. NABOB stands ready to assist the Commission in developing such a study,

but to withstand judicial scrutiny, the study should be supervised by the Commission and receive an official Commission approval upon completion.

NABOB also submits that the Commission's decisions regarding eliminating market entry barriers must be guided by its statutory obligation to promote diversity of viewpoints through diversity of ownership of the nation's communications industry. Although targeting small businesses is commendable, it is not enough. Achieving diversity of viewpoints requires that the Commission attempt to eliminate barriers to entry faced by minority entrepreneurs. It also requires that the Commission recommend to Congress reinstatement of the minority tax certificate policy. In support of its position, NABOB submits the following:

**I. NABOB HAS A SUBSTANTIAL INTEREST IN THIS PROCEEDING**

NABOB is the trade association representing the interests of the African American owned commercial television and radio stations and cable television systems throughout the United States. In that capacity, NABOB has two principal objectives: (1) to increase the number of African American owners of communications facilities and (2) to improve the business climate in which African American owned

communications facilities operate. The issues raised in the NOI are fundamental to the interests of NABOB's members.

Congress and the United States Supreme Court have recognized for many years that there are important First Amendment reasons for promoting the ownership and control of communications facilities by minorities. See Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 560-563 (1990). Essentially, the policy of diversity of ownership stems from recognition that a diverse number of voices controlling news and editorial content in each of the mass media services is the only means of protecting the First Amendment right of freedom of speech for all Americans.

In addition, Congress and the Supreme Court have separately recognized that, to remedy past discrimination, minorities must be given assistance in obtaining economic opportunities in our society. This second objective has been recognized by Congress in connection with a number of legislative actions in which no First Amendment issues were involved. See Fullilove v. Klutnick, 448 U.S. 449 (1980). NABOB submits, therefore, that it has clear standing and that its comments presented herein should be given substantial consideration by the Commission in this NOI. See United Church of Christ v. FCC, 359 F.2d 994, 1005, 53 RR2d 2001, 2013-2014 (D.C. Cir. 1966); Michael Matheson et al., 53 RR2d 997,

998 (1983); and Baltimore Area Renewals, 89 FCC 2d 1183, 51 RR2d 727 (1982).

## **II. THE BARRIERS TO ENTRY HAVE NOT CHANGED FOR AFRICAN AMERICAN BROADCASTERS**

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The barriers to entry for African Americans in the telecommunications industry are the following:

1. The principal barrier to entry in the communications industry, and barrier to business ownership in general, for African Americans is lack of access to capital. See, In the Matter of Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses, GN Docket No. 96-113, May 21, 1996, para. 29. The principal sources of capital for all start-up entrepreneurs are personal capital and capital contributed by friends and family. It follows then that, because African Americans approach the business world from a community which has suffered historical racial discrimination, African American entrepreneurs have less capital, and have friends and family with less capital, than their non-



minority counterparts. Therefore, African Americans have a greater need for financing from financial institutions. However, it has also been documented that African Americans are discriminated against by financial institutions. That discrimination usually results in an outright denial of credit, or, at best, higher interest rates and more onerous collateral and loan terms. It is reported that African Americans are often required to sign personal guarantees for loans where similarly situated non-minorities are not. Institutional equity capital is usually denied outright.

2. African Americans are discriminated against in employment in all aspects of the telecommunications industry. As a result, African Americans are rarely employed in senior management positions and have few opportunities to obtain the senior management experience which financial institutions seek when making investment and lending decisions.
3. African American entrepreneurs who have successfully built and operated businesses receive

little credit for their success and experience in non-telecommunications businesses when seeking financing in telecommunications businesses.

4. African Americans are not offered an opportunity to purchase the most desirable telecommunications businesses, because the businesses are bought and sold through an "old boys network."
5. In the broadcasting industry, African American stations have their African American audiences discounted by advertisers and advertising agencies. Advertisers and ad agencies often do not buy time on African America owned stations, because they assume the audience lacks the disposable income necessary to purchase their products. If they do buy time, they negotiate rates less than they pay for a non-minority audience of the same size.
6. African Americans are rarely able to enter into joint ventures or strategic partnerships with established non-minority companies. A case in point is the Commission's recent C-block auction for PCS licenses. When the Commission's auction rules were fashioned, it appeared that, with only

three 30-MHz licenses per market, one of which was reserved for small businesses, many large telecommunications companies would seek to enter into strategic partnership with small businesses for the C-block 30 MHz licenses. Instead, the major telecommunications companies forged alliances among themselves in the A and B-block auctions and made very few alliances with C-block bidders. Unfortunately, when confronted with these huge alliances, such as the Sprint-TCI-Cox Cable-Comcast partnership (Sprint PCS), and the Bell Atlantic-NYNEX-Air Touch-US West partnership (PCS Primeco), the Commission took no action to limit these huge concentrations of industry control. As a result, many African American owned companies were unable to attract capital to bid in the C-block auction and many others withdrew before the auction concluded.

**III. THE COMMISSION HAS BEEN DEVELOPING THE RECORD WHICH JUSTIFIES  
POLICIES TO PROMOTE MINORITY OWNERSHIP IN THE COMMUNICATIONS  
INDUSTRY FOR APPROXIMATELY TWENTY YEARS**

The Commission is attempting to answer questions in this proceeding it has previously answered. The answers to those questions have not changed. What has changed is the quantity and quality of record evidence that the Commission must provide in answering those questions, which the Supreme Court has now demanded in Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995) ("Adarand"). In order to develop a record which can withstand judicial scrutiny, the Commission must undertake its own Adarand study rather than to rely solely upon the record developed in this proceeding by commenters. The Commission should begin its study by assimilating all of the record evidence developed in prior proceedings.

The Commission issued its Policy Statement on Minority Ownership in 1978. Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 F.C.C. 2d 979. That Policy Statement was based upon substantial record evidence developed by the Commission. Id. In 1982, the Commission expanded the Policy Statement. Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting, 92 F.C.C. 2d 849, 851 (1982). This

expansion was also based on substantial record evidence developed by the Commission. Id.

Therefore, the barriers to entry for African Americans and other minorities are not unknown to the Commission. The need for Commission policies to promote minority ownership has been documented in prior Commission proceedings and in numerous studies over the last twenty years. See Minority Ownership NPRM at 2-5, 8-9. The effort to document that need has been significantly advanced by a study prepared in 1995 by the National Telecommunications and Information Administration ("NTIA"). Capital Formation and Investment in Minority Business Enterprises in the Telecommunications Industries, U.S. Department of Commerce, NTIA, Office of Policy Analysis and Development, April, 1995 (the "NTIA Study"). The NTIA Study reports that:

1. Average gross receipts for all minority businesses in 1987 were \$64,132; what was thirty-four percent (34%) of the \$189,000 averaged by firms owned by white males. NTIA Study at 6.
2. Minorities comprise approximately twenty-five percent (25%) of the U.S. population, but minority firms represent only nine percent (9%) of U.S. businesses. Id.
3. African Americans constitute twelve percent (12%) of the U.S. population, but African American firms represent only three and one-tenth percent (3.1%) of U.S. businesses. Id.

4. The number of African American owned companies listed in the Black Enterprise magazine list of the 100 largest African American owned companies decreased from 33 in 1992 to 29 in 1993 and 28 in 1994. In addition, the number of persons employed by those companies decreased from 10,821 in 1992 to 10,076 in 1993 and 10,007 in 1994. NTIA Study at 8.
5. African Americans own only 193 commercial broadcast stations, representing only one and seven-tenths percent (1.7%) of the total in the U.S. Id. at 9.
6. Banks provide White borrowers with \$1.83 in debt for each dollar of equity capital they invest in their businesses, but African American borrowers receive only \$1.16 for each dollar of equity capital invested. Researchers have concluded that "banks treat Black and White loan recipients differently, even when their qualifications do not differ." Id. at 15.

Thus, the Commission can rely upon this significant study by NTIA as additional evidence of the need for governmental action to promote minority business opportunities in the telecommunications industry. Recently, NTIA completed its 1996 annual report on minority broadcast station ownership. It shows no significant improvement from the 1995 report. Minority Commercial Broadcast Ownership in the United States, NTIA, April, 1996.

**IV. THERE ARE CURRENT MARKET ENTRY BARRIERS FACING MINORITY ENTREPRENEURS THAT ARE THE DIRECT RESULT OF RACIAL DISCRIMINATION IN THE COMMUNICATIONS INDUSTRY**

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For the past several years, the Commission, the courts and Congress have fostered policies which have resulted in a consolidation of ownership in the broadcast industry and a retreat from the promotion of minority ownership. These policies include: 1) the repeal of "the seven station rule", 2) adoption of radio duopolies, 3) repeal of the tax certificate, 4) the Supreme Court's decision in Adarand and 5) the Telecommunications Act of 1996. In order to fully grasp or understand the real threat that these measures pose to minority ownership, they must not be viewed in isolation. The cumulative detrimental effect of these measures is pronounced. Even viewed alone, the Telecommunications Act of 1996, absent affirmative steps by the Commission to mitigate its effect, is a powerful impediment to minority ownership for existing minority owners as well as prospective minority entrants.

The increase in the number of radio and television stations one entity can own from seven to twelve was done over the strenuous objections of NABOB in 1985. See Amendment of Section 73.355 [formerly §§ 73.35, 73.240 and 73.636] of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations, 100 FCC 2d 74 (1985). In response to Congressional

inquiries regarding the wisdom of this policy change, due to its detrimental effect upon minority owned broadcast facilities, the Commission added a condition on the twelve station rule. This addendum allowed an entity to own an interest in up to fourteen of each type of station, if the two additional stations were minority controlled.

Although this special provision was intended to encourage joint ventures between non-minority and minority companies for the two additional stations, to NABOB's knowledge, this has never been the case. No non-minority company ever took advantage of this provision and minority ownership was left in a much worsened position as a result of the policy change. What did happen, as a result of the increased ownership limits, was the formation of mega-mergers like: Capital Cities acquisition of ABC and G.E.'s acquisition of NBC.

NABOB has commented over an extended period about how the effects of the implementation of the twelve station rule, combined with other deregulatory efforts is slowing the growth in ownership of broadcast facilities by minorities, particularly African Americans. (For example, In re Revision of Radio Rules and Policies, MM Docket No. 91-140, Aug. 5, 1991; In re Review of the Policy Implications of the Changing Video Marketplace, MM Docket



No. 91-221, July 5, 1994.) NABOB demonstrated then that from 1976 to 1981, when the FCC was seriously and actively committed to increasing minority ownership, the number of African American owned radio stations grew dramatically:

**African American Owned Stations**

<u>1976</u>	<u>1981</u>
radio: 30	radio:141
tv: 1	tv: 10

Over the past fifteen years, when there was no consensus within the FCC seriously in favor of minority ownership, African American station ownership has grown only marginally:

<u>1981</u>	<u>1996</u>
radio: 141	radio: 176
tv: 10	tv: 27

These numbers reflect total African American ownership in a broadcast industry comprised of more than 10,000 commercial radio stations and 2,000 commercial television stations.

The competitive disadvantage suffered by minority owned broadcast stations was further compounded when the Commission increased the multiple ownership limits to eighteen AM radio stations and eighteen FM radio stations (the "eighteen station

rule"), and the Commission eliminated its rule prohibiting radio duopolies. Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 7 FCC Rcd 6387 (1992). The elimination of the duopoly rule clearly worked to preclude growth in ownership of radio and television facilities by minorities.

The repeal of the tax certificate program is another market entry barrier for minority entrepreneurs. In such a capital intensive market, procuring investors and raising enough capital to finance broadcast ownership is a woefully hard task for most, especially if one faces institutional discrimination. African American entrepreneurs, in addition to the problems attendant to being small players in the industry, face discrimination in the area most vital to entrepreneurship: capital investment. Nonminority companies are reluctant to seek deals with minority companies because they fear that the minority buyer will have difficulty obtaining financing. The tax certificate policy made the "hassle" of waiting on a minority entrepreneur to procure financing worthwhile due to the benefit of deferring payment of capital gains taxes. Without this tax incentive or some similar measure, nonminority companies have historically not viewed sales to with minority entrepreneurs as attractive. Therefore, the

Commission should recommend to Congress re-instatement of the minority tax certificate policy or some functional equivalent.

The Supreme Court's decision in Adarand means that the Commission may face legal opposition to programs designed to aid minority entrepreneurs. The prospect of such an occurrence should not deter the Commission from fulfilling its statutory goal of diversity of media ownership. If anything, Adarand should motivate or galvanize the Commission to propose to Congress or adopt via its rulemaking power, policies which are well researched, well drafted, and truly beneficial.

Congress' effort to deregulate the telecommunications industry with the Telecommunications Act of 1996 is unfortunately a further barrier in the struggle to foster minority ownership. As a result of the Telecommunications Act of 1996, many minority station owners and entrepreneurs have found themselves in the precarious situation of being unable to compete in the bidding for the most desirable stations in their markets and competing with stations that are rapidly becoming parts of large broadcast groups. NABOB has fought the various measures, culminating with the Act, that adversely impact minority interests. As a result of these latest policy changes, we see: Disney acquiring CapCities/ABC; Westinghouse acquiring CBS and Infinity; Southwestern Bell acquiring Pac Bell,

and Bell Atlantic merging with NYNEX. Diversity of ownership has taken a back seat to deregulation. Minorities, particularly African Americans, are the disproportionately impacted losers in this new era. The Commission has a statutory obligation to reverse this trend.

**V. THE COMMISSION HAS A STATUTORY OBLIGATION TO CONTINUE TO PROMOTE MINORITY OWNERSHIP**

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NABOB submits that the Commission's analysis in this proceeding must begin with the recognition that, in spite of the current political climate, the Commission continues to have a statutory obligation to promote minority ownership. As the Commission noted in the NPRM, the legislative history of Section 257 of the Telecommunications Act of 1996 supports the Commission's continued obligation to promote minority business opportunities. See 142 Cong. Rec. H1141 at H1176-77 (daily ed. Feb. 1, 1996) (statement of Rep. Collins). NPRM at n. 9. The Commission must not bend to certain political pressures but must instead effectuate its statutory obligation in a manner that is efficient and truly helpful. We recognize that the repeal of the tax certificate policy emboldened the communications "militias" who have historically objected to all pro-diversity efforts by the

Commission. However, the Commission must carry out its statutory obligation regardless of criticism and harassment from those who seek to turn back the clock on the promotion of minority ownership.

**VI. THE COMMISSION MUST CONDUCT AN ADARAND STUDY TO COMPLY WITH THE REQUIREMENTS OF ADARAND V. PENA SHOWING THE NEED FOR POLICIES TO PROMOTE MINORITY OWNERSHIP**

The Commission needs to develop an Adarand Study including empirical data on the status of minority ownership in the communications industry. NABOB submits that the Commission should not rely only on the comments of external parties to produce such empirical data. In the wake of the Supreme Court's decision in Adarand, it is imperative that the Commission develop an extensive record to support policies designed to increase minority ownership. In the absence of an Adarand Study, the Commission will be ill-equipped to empirically demonstrate both the true depth of the problem, the compelling interest advanced, and the narrowness of the remedy. In the face of an Adarand challenge to the statutory mandate, the Commission should be prepared to passably demonstrate the utility and necessity of minority initiatives under strict scrutiny.

Therefore, the Commission should initiate a thorough Adarand Study of minority ownership. Such a study should be designed to obtain the following information:

1. All minority controlled communications licensees in all commercial services.

2. When each license was acquired.

3. Whether any of the Commission's minority ownership policies were used by the licensee in acquiring the facility.

4. What sources of financing the licensee used in acquiring the facility.

5. What barriers to entry the licensee encountered in acquiring the facility and what ongoing barriers the licensee is facing in making it commercially successful.

NABOB submits that a failure by the Commission to conduct such an Adarand Study will leave the remaining minority ownership policies, as well as those which might be adopted in this proceeding, vulnerable to another fatal attack similar to the one launched upon the tax certificate policy.

**VII. THE COMMISSION MUST TAKE ACTION TO PRESERVE EXISTING MINORITY OWNERSHIP AND TO FOSTER ENTRY BY NEW MINORITY ENTREPRENEURS**

NABOB submits that, while awaiting completion of the Adarand Study, the following specific proposals should be adopted to support the overriding policy of preserving diversity of ownership:

1. The Telecommunications Development Fund ("TDF") should be used to provide equity investments, low interest loans and loan guarantees to minority businesses, provide technical assistance, provide market research, and augment the budget of the Office of Communications Business Opportunities.

2. When non-minority licensees request waivers of the Commission's rules, require them to demonstrate what they have done to help promote the public interest, recognizing that efforts to increase minority ownership would be an appropriate public interest endeavor.

3. Revise the FCC Form 323 Annual Ownership Report to require racial information on owners. NABOB supports the proposed revision to Form 323. As noted above, the amount of information the Commission can provide to support the need for continuing its minority ownership policies has become crucial. The collection of the proposed ownership information on the Form 323 should be a part

of a larger effort by the Commission to collect the information listed above on minority ownership.

4. Adopt an incubator program as previously proposed by NABOB, NBMC and NBA. In the Minority Ownership NPRM, the Commission pointed out that NABOB, NBMC and NBA previously commented that the incubator program, as originally proposed by the Commission, needed to be substantially revised to be effective in promoting minority ownership. Minority Ownership NPRM at 12-13. The Commission has proposed to revise the incubator program to reflect the suggestions from NABOB/NBMC/NBA. Id.


#### **VIII. CONCLUSION**


NABOB submits that the most critical purpose which can be served by this proceeding is to help develop the record for use in a formal Adarand Study. NABOB is committed to helping the Commission to develop that record, but NABOB urges the Commission to focus its resources on development of a thorough, well-documented Adarand study. The Commission must complete an Adarand Study in order to facilitate adoption of programs to comply with its statutory obligation to promote minority ownership in the communications industry and to remove market entry barriers to minority entrepreneurs.



Respectfully submitted,

**THE NATIONAL ASSOCIATION OF  
BLACK OWNED BROADCASTERS, INC.**

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